Rejab bin Lebai Man & Anor v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42A–2 AND 42A–3 OF 2000
AUGUSTINE PAUL J
26 JULY 2001

Criminal Law *— Cheating — Dishonest inducement for allocation of shares — Prosecution to show accused not eligible for allocation of shares, whether proved — Abetment of cheating, ingredients of — Whether cheating and abetment proved — Penal Code s 420*

The first accused was charged with an offence of cheating under s 420 of the Penal Code in that he had dishonestly deceived the Jawatankuasa Pembahagian Saham Khas Bumiputera ('Jawatankuasa') of the Ministry of International Trade and Industry into believing that an applicant named Mohamed bin Mahdin had applied for 500,000 shares of Juan Kuang (M) Industrial Bhd and that he fell within the category of persons eligible to be granted special shares and had thereby dishonestly induced the Jawatankuasa to deliver the said 500,000 shares which it would not have done had it not been so deceived. The second accused was charged with the offence of having abetted the first accused. Both claimed trial and were found guilty and sentenced to five years imprisonment each at the conclusion of the trial. They appealed against their convictions and sentences.

Held, allowing the appeal and ordering both accused to be acquitted and discharged:

(1) No evidence was adduced to show that an applicant named Mohamad bin Mahdin had applied for 500,000 Juan Kwang shares as stated in the charge. The evidence on record therefore did not support the charge as framed (see p 117F–G). As the applicant for the shares was in fact Hj Mohammad bin Mahdin, the prosecution must prove that he did not fall within the category of persons eligible to be granted special shares. The Proforma Information on Company ('the proforma'), a document in exh P3, clearly showed that Juan Kuang did not have a shareholder or director named Hj Mohammad bin Mahdin. This would have been sufficient to show that he was not eligible for the allocation of shares in Juan Kuang. Unfortunately, the proforma was not tendered in evidence while various other documents in exh P3 were separately tendered and marked as exhibits (see pp 118H–I, 120B).

(2) The proforma was merely an enclosure in exh P3 and was not even referred to nor identified by any witness. The fact that a file with enclosures had been tendered in evidence did not mean that the enclosures were proved. The file was marked as an exhibit only to show that it had been taken possession of (see *Datuk Haji*

Harun bin Haji Idris v PP [1978] 1 MLJ 240). The enclosures in it must be separately proved in the normal way in order for them to have any evidential value. The contents of the proforma, having not been proved, were thus hearsay and inadmissible. The proforma therefore did not assist the prosecution to prove its case (see p 119F–G).

(3) The charge against the first accused was defective. As the applicant for the shares in exh P3A was Hj Mohammad bin Mahdin, he should have been identified as the applicant for the shares in the charge with evidence to show that he did not fall within the category of persons eligible to be granted special shares. As the defect in the charge went to the root of the case for the prosecution, it was fatal. It followed that the prosecution had not made out a case against the first accused at the end of its case (see p 120B–C).

(4) Abetment of an offence is a distinct offence from the offence itself. Thus, it does not follow that if the charge against the principal offender could not stand, the case against the abettor must fall as well. Also, the offence of abetment in the Penal Code deals only with offenders who would be classified in English law as accessories before or at the fact and not accessories after the fact (see p 120D, H). The facts of this case could be divided into three segments. There was no evidence to link the second accused's involvement in the third segment with the first and second segments. His involvement only with the third segment did not disclose the commission of any offence. In order to make out a case against the second accused, the prosecution ought to have led evidence to show that the shares were obtained by deception with his knowledge. Without knowledge or intention there could be no abetment since the knowledge and intention must relate to the crime (see p 121A, D–E). It is settled law that in order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent but in some way or other it is absolutely necessary to connect him with those steps of the transaction which are criminal. No case of abetment had, therefore, been made out against the second accused. In any event, the charge preferred against him was defective just as in the case of the first accused (see p 121F–G).

[Bahasa Malaysia summary

Tertuduh pertama telah dituduh melakukan satu kesalahan menipu di bawah s 420 Kanun Keseksaan di mana beliau dengan tidak jujur menipu Jawatankuasa Pembahagian Saham Khas Bumiputera ('Jawatankuasa tersebut'), Kementerian Dagangan dan Industri Antarabangsa untuk mempercayai bahawa seorang pemohon bernama Mohamed bin Mahdin telah memohon sebanyak 500,000

syer Juan Kuang (M) Industrial Bhd dan bahawa beliau terangkum dalam kategori orang-orang yang layak untuk diberikan syer-syer yang khas dan oleh itu telah dengan tidak jujur mempengaruhi Jawatankuasa tersebut untuk memberikan syer-syer sebanyak 500,000 tersebut yang mungkin ia tidak akan berbuat demikian sekiranya ia tidak ditipu. Tertuduh kedua telah dituduh melakukan kesalahan bersubahat dengan tertuduh pertama. Kedua-duanya menuntut untuk dibicarakan dan didapati bersalah dan dijatuhkan hukuman sehingga lima tahun penjara masing-masing di penutup perbicaraan tersebut. Mereka telah membuat rayuan terhadap sabitan-sabitan dan hukuman-hukuman mereka.

Diputuskan, membenarkan rayuan tersebut dan memerintahkan kedua-dua tertuduh dibebas dan dilepaskan:

(1) Tiada keterangan telah dikemukakan yang menunjukkan bahawa seorang pemohon bernama Mohamed bin Maidin telah memohon sebanyak 500,000 syer-syer Juan Kuang sebagaimana yang dinyatakan dalam kertas pertuduhan. Keterangan atas rekod oleh itu tidak menyokong pertuduhan sebagaimana yang telah dibuat (lihat ms 117F–G). Memandangkan pemohon untuk syer-syer tersebut sememangnya Hj Mohammad bin Maidin, pendakwaan mestilah membuktikan bahawa beliau tidak terangkum dalam kategori orang-orang yang layak untuk diberikan syer-syer khas. Proforma Information on Company ('proforma tersebut'), satu dokumen dalam eksh P3, dengan jelas menunjukkan bahawa Juan Kuang tidak mempunyai seorang pemegang saham atau pengarah bernama Hj Mohammad bin Maidin. Adalah mencukupi untuk menunjukkan bahawa beliau tidak layak untuk pembahagian syer-syer dalam Juan Kuang. Malangnya, proforma tersebut tidak ditenderkan sebagai keterangan manakala pelbagai dokumen-dokumen lain dalam eksh P3 telah ditenderkan berasingan dan ditandakan sebagai ekshibit-ekshibit (lihat ms 118H–I, 120B).

(2) Proforma tersebut hanya satu lampiran dalam eksh P3 dan tidakpun dirujuk atau dikenalpasti oleh mana-mana saksi. Hakikat bahawa satu fail dengan lampiran-lampiran yang telah ditenderkan sebagai keterangan tidak bermaksud lampiran-lampiran tersebut telah dibuktikan. Fail tersebut telah ditandakan sebagai ekshibit hanya untuk menunjukkan bahawa ia telah dirampas (lihat *Datuk Haji Harun bin Haji Idris v PP* [1978] 1 MLJ 240). Lampiran-lampiran dalamnya mestilah dibuktikan secara berasingan dengan cara biasa bagi membolehkan mereka mempunyai apa-apa nilai keterangan. Kandungan profroma tersebut, yang tidak dibuktikan, oleh demikian adalah dengar cakap dan tidak boleh diterima. Proforma tersebut dengan itu tidak membantu pendakwaan membuktikan kesnya (lihat ms 119F–G).

(3) Pertuduhan terhadap tertuduh pertama adalah cacat. Memandangkan pemohon untuk syer-syer dalam eksh P3A adalah Hj Mohammad bin Maidin, beliau sepatutnya dikenalpasti sebagai pemohon untuk menunjukkan bahawa beliau tidak terangkum dalam kategori orang-orang yang layak untuk diberikan syer-syer khas. Oleh kerana kecacatan dalam pertuduhan tersebut melibatkan asas kes pendakwa raya tersebut, ia membawa padah. Selanjutnya pendakwaan tidak dapat membentuk satu kes terhadap tertuduh pertama di akhir kesnya (lihat ms 120B–C).

(4) Persubahatan dalam satu kesalahan adalah satu kesalahan yang berbeza daripada kesalahan itu sendiri. Oleh itu, tidak boleh dikatakan bahawa jika pertuduhan terhadap pesalah utama tidak boleh dipertahankan, kes terhadap orang yang bersuhabat juga mestilah gagal. Juga, kesalahan bersubahat dalam Kanun Keseksaan hanya membincangkan pesalah-pesalah yang boleh diklasifikasikan di bawah undang-undang Inggeris sebagai peserta-peserta sebelum atau semasa fakta tersebut dan bukan peserta-peserta selepas fakta tersebut (lihat ms 120D, H). Fakta-fakta kes boleh dibahagikan kepada tiga bahagian. Tiada keterangan yang mengaitkan penglibatan tertuduh kedua dalam bahagian ketiga dengan bahagian-bahagian pertama dan kedua. Penglibatan beliau hanya dengan bahagian ketiga tidak mendedahkan perbuatan apa-apa kesalahan. Bagi tujuan membentuk satu kes terhadap tertuduh kedua, pendakwaan sepatutnya mengemukakan keterangan untuk menunjukkan bahawa syer-syer tersebut telah diperolehi melalui penipuan dengan pengetahuan beliau. Tanpa pengetahuan atau niat tidak mungkin berlaku persubahatan kerana pengetahuan dan niat mestilah berkaitan dengan jenayah (lihat ms 121A, D–E). Adalah undang-undang mapan bahawa bagi tujuan mensabitkan seseorang itu bersubahat melakukan satu jenayah, bukan hanya perlu dibuktikan bahawa beliau telah mengambil bahagian dalam langkah-langkah transaksi yang tidak bersalah tetapi walau apa cara sekalipun ia adalah perlu untuk mengaitkan beliau dengan langkah-langkah transaksi tersebut yang bersifat jenayah. Tiada kes bersubahat telah, oleh itu, dibentuk terhadap tertuduh kedua. Dalam apa keadaan, pertuduhan yang dibuat terhadap beliau adalah cacat sama seperti dalam kes tertuduh pertama (lihat ms 121F–G).]

Notes

For cases on cheating, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2129–2147.

Cases referred to

AlliedBank (M) Bhd v Yau Jiok Hua [1998] 6 MLJ 1 (refd)
Chua Kian Kok v PP [1999] 2 SLR 542 (refd)

Datuk Haji Harun bin Haji Idris v PP [1978] 1 MLJ 24 (refd)
Dr Dattatraya Narayan Samant v State of Maharashtra (1982) 1 Bom CR 1 (refd)
Faguna Kanta Nath v State of Assam AIR 1959 SC 673 (refd)
Jammuna Singh v State of Bihar AIR 1967 SC 553 (refd)
Kee Kim Chooi & Ors v PP [1952] MLJ 180 (refd)
Mohamed Jamal v State AIR 1930 Sind 64 (refd)
Nim Chand Mookerjee (1873) 20 WR 41 (refd)
Periasamy s/o Sinnapan & Anor v PP [1996] 2 MLJ 557 (refd)
PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 (refd)
Sesha Ayyar v Venkatasubba Chetty AIR 1924 Mad 487 (refd)
V Daniel v PP [1956] MLJ 186 (refd)
Varatharajalu v PP [1960] MLJ 158 (refd)

Legislation referred to

Penal Code ss 107, 420

Appeal from: Arrest Cases No 61–9 of 1993 and No 62–157 of 1993 (Sessions Court, Kuala Lumpur)

Christopher Fernando (*Marissa Regina* with him) (*Aris Rizal Christopher Fernando & Co*) for the first appellant.

Rafie Mohd Shafie (*Rafie Mohd Shafie & Associates*) for the second appellant.

Ahmad Rosli bin Mohd Sham (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Augustine Paul J. : Rejab bin Lebai Man ('the first accused') was charged in the Sessions Court at Kuala Lumpur with an offence of cheating under s 420 of the Penal Code in that he dishonestly deceived the Jawatankuasa Pembahagian Saham Khas Bumiputera ('the Jawatankuasa') of the Ministry of International Trade and Industry ('the Ministry') into believing that an applicant named Mohamed bin Mahdin had applied for 500,000 shares of Juan Kuang (M) Industrial Bhd ('Juan Kuang') and that he fell within the category of persons eligible to be granted special shares and that he had also applied for the shares to be registered in the name of his company Natovest (M) Sdn Bhd ('Natovest') and had thereby dishonestly induced the Jawatankuasa to deliver the said 500,000 shares which it would not have done had it not been so deceived. Nordin bin Kahar ('the second accused') was charged with the offence of having abetted the first accused. Both the accused persons claimed trial. At the conclusion of the trial they were found guilty and convicted and sentenced to five years' imprisonment each. This appeal is by both the accused persons against their convictions and sentences.

The Royal Malaysian Police Co-operative Sdn Bhd ('the Police Co-operative') held shares in various companies. One such company is Juan Kuang where it held 25% of the shares. The Police Co-operative appointed its officers to serve as nominee directors in the companies where it held shares. The nominee director of the Police Co-operative in Juan Kuang was

one Mohamad bin Mahdin (PW1) who was appointed to that position on 7 December 1992. At that time Juan Kuang was in the process of floating its shares on the second board of the Kuala Lumpur Stock Exchange. By a letter dated 10 May 1993 ('exh P1') PW1 applied for 200,000 shares in Juan Kuang. Exhibit P1 reads as follows:

> Mohamad bin Mahdin
> No 38, Jalan 4/5D
> Bandar Baru Bangi
> 43000 Kajang
> Selangor Darul Ehsan
>
> 10 Mei 1993
>
> Ketua Setiausaha
> Pembangunan dan Perindustrian
> Kementerian Perdagangan Antarabangsa dan Industri
> Blok 10, Tingkat 10
> Kompleks Pejabat-Pejabat Kerajaan
> Jalan Duta
> 50622 Kuala Lumpur
> (U/P: ENCIK REJAB BIN MAN)
>
> Tuan
>
> JUAN KUANG (M) INDUSTRIAL BERHAD
> PERMOHONAN PERUNTUKAN SAHAM BAGI BUMIPUTERA
> OLEH MOHAMAD BIN MAHDIN
>
> Dengan segala hormatnya adalah dimaklumkan saya adalah Pengarah syarikat yang tersebut di atas yang mana syarikat ini dipercayai akan dipasarkan di Bursa Saham Kuala Lumpur (BSKL) pada hujung bulan Jun/awal bulan Julai 1993.
>
> Oleh yang demikian saya benar-benar berharap dengan ini memohon untuk mendapatkan peruntukan saham syarikat yang tersebut di atas sebanyak 200,000 unit semata-mata dengan tujuan untuk menguatkan lagi kedudukan saya di dalam syarikat tersebut.
>
> Seterusnya sebagaimana tuan sedia maklum pihak Koperasi Polis Diraja Malaysia Bhd adalah pemegang ekuiti/saham sebanyak 25% dalam syarikat yang tersebut di atas pada masa kini.
>
> Sekian, sekali saya benar-benar berharap agar permohonan saya dapat diberi pertimbangan dan kelulusan oleh pihak tuan.
>
> Terima kasih.
>
> Yang benar
>
> tt
> MOHAMAD BIN MAHDIN
> MM/sm

PW1 addressed the letter to the first accused as he was the person in the Ministry who was responsible for processing applications for shares in Juan Kuang. PW1 then handed over exh P1 to one Munajat bin Idris (PW2), the then General Manager of the Police Co-operative, to be sent to the Ministry. PW2 then spoke to the first accused about PW1's intention to apply for shares in Juan Kuang. According to PW2 the first accused told

him that PW1, being a nominee director and not an independent director of Juan Kuang, was not eligible to apply for the shares. PW1 was satisfied with the explanation and exh P1 was not forwarded to the Ministry. On 24 August 1993 PW1 was informed by one Puan Rohana Ramli, an officer with the Ministry, that 500,000 shares in Juan Kuang had been allocated to him in the name of Natovest. PW1 was shocked and went to the Ministry to find out more about the allocation of shares made in his name. As he said:

> Di MITI saya ditunjukkan fail yang mengandungi surat permohonan saham Juan Kuang atas nama saya. Surat ini mempunyai tandatangan yang bukan tandatangan saya dan nama saya dieja menggunakan dua M bagi ejaan Mohammed. Nama ini didahului dengan gelaran Haji yang mana saya tidak gunakan dalam surat menyurat saya.
>
> Jumlah saham yang dipohon ialah 800,000 unit dan dalam surat permohonan itu dinyatakan jika berjaya saham itu hendaklah diperuntukkan atas nama Syarikat Natovest dan saya tiada syarikat nama Natovest.

PW1 then made a police report on 4 September 1993. He also said that he had met the first accused earlier. He did not know the second accused.

Abd Rahman bin Husin (PW3) was the Deputy Director of the Unit Dasar Bahagian Pembangunan Perindustrian of the Ministry at the material time. The first accused and one Abdul Shukor Ibrahim, both of whom being persons who worked under him, dealt with matters relating to shares. PW3 tendered in evidence exh P5 which dealt with the guidelines for allocation of shares to Bumiputeras. In referring to para 4 of exh P5 he said:

> Kesalahan perenggan 4 ini merupakan nisbah pembahagian (ratio of distribution). Di ms 4 perenggan (iii) maksud 'syarikat' dalam perenggan ini adalah syarikat yang memohon untuk mengagihkan saham melalui MITI. Berkenaan dengan Pengarah Syarikat yang memohon mengikut perenggan 3, adalah benar pengarah tersebut mesti merupakan *existing shareholder*. Berkenaan kelayakan Pengarah-Pengarah Syarikat yang memohon jika Pengarah nominee ia tak layak memohon. Pengarah nominee yang bukan existing shareholders tak layak memohon.
>
> (Saksi dirujuk kepada ms 6, perenggan 6, P5).
>
> Mengikut perenggan 6, selain dari Pengarah dari Syarikat yang memohon merupakan *existing shareholder* atau ahli Lembaga Pengarah, lain-lain pengarah tak layak memohon.

PW3 said that in the case of applications by directors of companies it may be done by way of a letter and there is no special form for that purpose. When such a letter is received it will be forwarded to the officer concerned for processing. PW3 tendered in evidence exh P3 which is the file relating to Juan Kuang. One of the documents in exh P3 is a letter (exh 3A) applying for shares in Juan Kuang. It reads as follows:

> 10 Mei 1993
>
> Ketua Setiausaha
> Kementerian Perdagangan Dan Perindustrian
> Tingkat 10, Blok 10
> Komplek Kerajaan Jalan Duta
> Kuala Lumpur

Tuan,

Per: Memohon Saham JUAN KUAN (M) INDUSTRIAL BHD
500,000 Unit

Merujuk kepada perkara di atas, saya ingin membuat permohonan saham di dalam syarikat JUAN KUAN (M) INDUSTRIAL BHD yang diperuntukkan kepada pelabur-pelabur bumiputra.

Untuk pengetahuan pihak tuan saya adalah salah seorang pengarah di dalam syarikat tersebut. Sekiranya permohonan ini mendapat kelulusan dari pihak kementerian, saya harap pihak tuan dapat mendaftarkan saham-saham tersebut ke atas nama syarikat saya sendiri iaitu:

NATOVEST (M) SDN BHD
NO 93C, TINGKAT 2
JALAN BANGSAR
59200 KUALA LUMPUR.

Saya harap pihak tuan dapat mempertimbangkan permohonan saya ini. Segala kerjasama dari pihak tuan sangat-sangat saya hargai.
Sekian Terima kasih.

Yang benar

tt
HJ MOHAMMAD BIN MAHDIN
PENGARAH

PW3 said that the matters relating to Juan Kuang were dealt with by the first accused. In particular the first accused prepared exh P3I the material part of which reads as follows:

SYOR

9 Berdasarkan kepada penilaian di atas, adalah disyorkan peruntukan saham Juan Kuang diluluskan seperti berikut:

(i) Saham khas sebanyak 1,000,000 unit pada harga RM3.30 sesaham diperuntukkan kepada Bumiputra berikut:

		Bil Saham
(a)	Natovest (M) Sdn Bhd (Hj Mohammad Mahdin)	500,000
(b)	PNB	500,000
		1,000,000

tertakluk kepada syarat bahawa saham-saham tersebut tidak boleh dijual atau dipindahmilik tanpa terlebih dahulu mendapat kelulusan bertulis Kementerian ini.

(ii) Sebanyak 999,000 unit saham diperuntukkan kepada kakitangan kumpulan syarikat sebagaimana nama-nama mereka dkepilkan pada surat Bank Saudagar bertarikh 30 April 1993.

PENUTUP

10 Syor seperti di para (9) dikemukakan untuk pertimbangan Jawatankuasa Pembahagian Saham Khas Bumiputra.

Exhibit P3I was signed by PW3. In further elaborating on this exh PW3 said:

Enclosure 9 adalah kertas cadangan atas permohonan Juan Kuang (M) Sdn Bhd. Ini cadangan untuk pertimbangan Jawatankausa Khas pembahagian saham mengenai pengagihan saham Juan Kuang kepada pelabur-pelabur bumiputra. Pegawai yang menyediakan kertas cadangan ini ialah pegawai penilai, En Rejab. Kertas cadangan ini sebelum dikemukakan kepada Jawatankuasa Khas saham telah ditandatangani oleh saya di ms 3. Juga di ms 3 di bawah tercatit nama pegawai pelesen En. Rejab Man. (Di perenggan 4, 5 dan 6 ms 2 saksi membaca isi kandungan encl 9). Maksud perenggan (6) adalah mengikut garis panduan P5. Ayat terakhir di perenggan 6 maksudnya peruntukkan ini memenuhi garis panduan di P5. Semasa saya menandatangani kertas cadangan ini saya berpuashati bahawa semua permohonan ini mengikut garis panduan. Saya berpuas hati kerana:

1. Submission kertas cadangan enclosure 9 adalah memenuhi garis panduan.
2. Saya telah mendapat kepastian dari En Rejab bahawa semua butir telah disemak dan disahkan.

Tugas-tugas mengesahkan butiran terperinci mengenai syarikat merupakan tanggungjawab pegawai proses.

Semasa menandatangani encl 9 saya percaya butir-butir yang terkandung dalam kertas cadangan adalah benar. Sekiranya saya syak dan mengetahui mana-mana butir dalam kertas cadangan ini saya tak akan tandatangan kertas cadangan ini. Bagi kertas cadangan ini, salinan kertas cadangan ini akan diberi kepada semua ahli jawatankuasa khas untuk pembahagian saham sebelum mesyuarat ahli jawatankuasa berkenaan untuk dibaca.

(Saksi dirujuk kepada perenggan 9 encl 9 dalam ID3).

Mengikut perenggan 9(i) permohonan oleh pengarah Juan Kuang, Hj Mahdin disyorkan menurut kertas cadangan ini diluluskan.

The Jawatankuasa had its meeting on 15 May 1993. It was chaired by the Minister of International Trade and Industry. The application for the shares by Hj Mohammad bin Mahdin was approved. As PW3 said in his evidence,

Ini adalah dokumen minit mesyuarat Jawatankuasa Khas Pembahagian Saham Bumiputra Bil 6/93. Mesyuarat ini adalah pada 15 Mei 1993 dipengerusikan oleh Menteri MITI. Dalam mesyuarat ini pada 15 Mei 93, saya telah turut hadir di mesyuarat tersebut. Turut hadir juga Menteri MITI, Ketua Setiausaha MITI, Asmat Kamaruddin, Timbalan Ketua Setiausaha Industri Dr Abdullah Tahir, saya, En Abd Mutalib Shafie Timbalan Pengarah Sektoral, En Zakri, Ketua Penolong Pengarah dan orang-orang yang dinyata dalam ms 1 dan 2 dalam minit ini. En Rejab juga hadir. Dia tertuduh No 1.

Mengenai minit di perenggan 6 mengenai permohonan Juan Kuang (M) Sdn Bhd, permohonan ini dibentangkan oleh pegawai penilai kes ini sendiri iaitu En Rejab di mesyuarat ini. Pembentangan itu seperti dalam kertas cadangan ID 31. Selain dari pembentangan seperti dalam ID 31, tertuduh No 1 bentang kertas cadangan secara lisan. Jawatankuasa tersebut menerima dan meluluskan permohonan selepas mendengarkan pembentangan kertas cadangan. Keputusan adalah di ms terakhir di ID 31. Keputusan yang telah dicapai di Jawatankuasa mesyuarat tersebut dicatitkan di ms akhir ID 31 dan ditandatangani oleh Menteri MITI di bawah ID 31 ms akhir. YB Menteri MITI menanda-tangani keputusan ini semasa Mesyuarat

Jawatankuasa itu diadakan. Nama YB Menteri ialah 'Rafidah 15 Mei 1993' dicatit di ID 31 muka akhir. YB Menteri juga telah membatalkan perkataan 'tidak bersetuju'. Tandatangan ringkas di tempat pembatalan ini adalah tandatangan ringkas YB Menteri sendiri. Sebagai ahli jawatankuasa ini saya mempercayai penjelasan dan pembentangan oleh tertuduh No 1, pegawai penilai mengenai permohonan ini. Saya selaku ahli jawatankuasa tiada punyai sebab untuk tidak mempercayai apa yang dibentangkan oleh tertuduh No 1.

Melihat kepada minit mesyuarat agenda adalah benar mengikut perenggan 2.5 ms 6 keputusan yang tercatit mencerminkan kelulusan YB Menteri MITI.

Di ms 12 di encl 9, ada terdapat tandatangan YB Menteri MITI. Minit mesyuarat jawatankuasa ini telah disediakan oleh En Rejab, tertuduh No 1.

By letter dated 20 May 1993 PW3 informed Natovest about the allocation of shares to it. The letter reads as follows:

ID)0.347/335
20 Mei 1993

Pengarah
Natovest (M) Sdn Bhd
No 93C, Tingkat 2
Jalan Bangsar
59200 Kuala Lumpur

Tuan,

JUAN KUANG (M) INDUSTRIAL BERHAD
Peruntukan Saham Kepada Bumiputera

Saya adalah diarah merujuk kepada surat tuan bertarikh 10 Mei 1993 mengenai perkara di atas.

2. Adalah dimaklumkan bahawa Kementerian ini bersetuju memperuntukkan kepada tuan sebanyak 500,000 unit saham Juan Kuang (M) Industrial Bhd pada harga RM3.30 sesaham tertakluk kepada syarat bahawa saham-saham tersebut tidak boleh dijual atau dipindahmilik tanpa terlebih dahulu mendapat kelulusan bertulis Kementerian ini.

3. Sekiranya pihak tuan menerima tawaran ini, sila tandatangani Surat Akujanji yang dikepilkan dan kemukakan kepada Kementerian ini dalam tempoh 2 minggu dari tarikh surat ini. Kegagalan berbuat demikian akan dikira sebagai tidak menerima tawaran ini.

Sekian, terima kasih.

BERKHIDMAT UNTUK NEGARA

Saya yang menurut perintah

tt
(ABD RAHMAN HUSIN)
Pembangunan Perindustrian
bp Ketua Setiausaha
Kementerian Perdagangan Antarabangsa & Industri.

Natovest was formed by the second accused. Its directors included Yacob bin Mat Yim (PW5) and Rusmawati binti Mohd Noor (PW6). They were not actively involved in the running of the company. As PW5 said:

> Saya tak ada menerima apa-apa keuntungan/faedah daripada syarikat ini. Pada pengetahuan saya, saya pernah dibagitahu bahawa syarikat ini digunakan untuk memberi saham-saham. Ini dibagitahu kepada saya oleh Nordin.

In June 1993 the second accused approached Wan Ismail bin Abdul Rahman (PW7), the General Manager of Mayban Finance Bhd, to apply for a loan to buy Juan Kuang's shares on the strength of the letter of offer (exh P7) from the Ministry. The loan application was processed by Marsilla binte Mohd Noor (PW8), a marketing officer attached to Mayban Finance Bhd. She was informed by the second accused that he was applying for the loan on behalf of Natovest. The loan approved was RM1.35m. The loan documents were signed by PW5 and PW6. The scripts for the 500,000 Juan Kuang shares were kept in the custody of Mayban Finance Berhad. In July 1993 the second accused instructed Norhayati binte Othman (PW13), a remisier with TA Securities, to sell 500,000 shares of Juan Kuang. The shares were sold on 28 July 1993 for RM2,769,880.45. Leong Yee Hoong (PW14) is the Branch Manager of Malayan Banking Bhd at Jalan Raja Muda. He confirmed that Natovest has a current account with the bank. On 7 August 1993 a sum of RM1.4m was credited into this account through two cheques. On 7 August 1993 a Natovest cheque for RM500,000 was deposited into the account of the second accused at the bank. From this account cheques for the amount of RM109,000 (exh P50) and RM744,000 (exh P49) were paid to one Mohd Sani bin Hamid who had also been charged with the two accused persons but was acquitted and discharged at the close of the case for the prosecution. Zaimi binte Mohd Noor (PW15), a branch manager of Southern Bank, said that Mohd Sani bin Hamid has an account with her bank and had a credit of RM853,000 on 10 August 1993. These sums were derived from Exhibits P49 and P50. From this account a cheque dated 14 August 1993 (exh P53) for the sum of RM250,000 was made payable to one Rejab bin Lebai Man. Ahmad Zulkifli bin Mohd Yusof (PW16), a branch manager of Malayan Banking Bhd, said that exh P53 was credited into the account of Rejab bin Lebai Man who has an account with his branch.

It will be observed that the facts of the case as adduced by the prosecution can be classified under three separate and distinct segments. The first segment deals with the intention of Mohamad bin Mahdin to apply for 200,000 shares in Juan Kuang and his subsequent discovery that an application for 500,000 shares had been made in his name though the signature in it was not his and his name had been spelt with a double 'm' preceded with the acronym 'Hj' for the word 'Haji'. The second segment deals with the processing of the application of Hj Mohammad bin Mahdin by the second accused and his recommendation for its approval which was accepted. The third segment deals with the disposal of the 500,000 Juan Kuang shares by the second accused and the crediting of RM250,000 into

the account of one Rejab bin Lebai Man. In substance the charge against the first accused states that he had dishonestly deceived the Jawatankuasa of the Ministry into believing that an applicant named Mohamad bin Mahdin had applied for 500,000 shares of Juan Kuang and that he fell within the category of persons eligible to be granted special shares. Accordingly, the prosecution attempted to show, inter alia, that the first accused had dishonestly deceived the Jawatankuasa of the Ministry into believing

(1) that an applicant named Mohamad bin Mahdin had applied for 500,000 shares of Juan Kuang and

(2) that he fell within the category of persons eligible to be granted special shares

I shall now deal with these two issues against the background of the charge as preferred and the evidence as adduced.

That an applicant named Mohamad bin Mahdin had applied for 500,000 shares of Juan Kuang

The charge as framed and pursued requires proof to show, inter alia, that the deception practised by the first accused was that Mohamad bin Mahdin had applied for 500,000 shares of Juan Kuang. In this respect the evidence adduced by the prosecution only reveals that the person called Mohamad bin Mahdin had intended to apply for 200,000 Juan Kuang shares. In accordance with his intention he had prepared exh P1 which, however, was not forwarded to the Ministry as he was not eligible to apply for the shares. The further evidence adduced, in particular exhs P3A and P3I, show that the applicant for the shares was not Mohamad bin Mahdin but one Hj Mohammad bin Mahdin. If the charge as framed is to stand evidence ought to have been led to show that the first accused deceived the Jawatankuasa into believing that the applicant named Hj Mohammad bin Mahdin in exh P3A was in actual fact a reference to Mohamad bin Mahdin. The prosecution ought to have established a link between the first and the second segments of the case to which I have made reference earlier. Such evidence would have shown that an applicant named Mohamad bin Mahdin had applied for 500,000 Juan Kwang shares as stated in the charge. No such evidence was adduced. The evidence on record therefore does not support the charge as framed.

That Mohamad bin Mahdin fell within the category of persons eligible to be granted special shares

In accordance with the alleged deception practised by the first accused as specified in the charge the prosecution led evidence to show that Mohamad bin Mahdin, being a nominee director of Juan Kuang, did not fall within the category of persons eligible to be granted special shares. This, as I have explained earlier, ignores the factual matrix of the case. Mohamad bin Mahdin does not play any part in the approval of the shares in favour of Hj Mohammad bin Mahdin. As the applicant for the shares was in fact

Hj Mohammad bin Mahdin the prosecution must prove that he is the person who did not fall within the category of persons eligible to be granted special shares. In a bid to show that this issue has been proved the learned deputy public prosecutor ('the DPP') referred to an enclosure in exh P3 entitled Proforma Information on Company ('the proforma') and exh P3H. He said that these documents show that the applicant was not a director of Juan Kuang in order to be entitled to the shares.

The proforma is a document in exh P3. As I said earlier exh P3 is a file from the Ministry containing documents relating to Juan Kuang. The proforma is one such document and contains information pertaining to Juan Kuang. With regard to Juan Kuang's shareholders and the Board of Directors it reads as follows:

7 Bumiputra shareholders:

Shareholders	Number of Shares Held	%	% Effective Bumiputra
Koperasi Polis Diraja (M) Berhad	4,750,000	25	25

8 Substantial Shareholders (5% and more):

Shareholders	Number of Shares Held	%
Juan Kuang Holdings Sdn Bhd	14,250,000	75
Koperasi Polis Diraja (M) Berhad	4,750,000	25
	19,000,000	100

9 Board of Directors:

	Number of Shares Held				Citizenship
Name	Direct	%	Indirect	%	
Ang Chiong Chai	–	–	–	–	Singaporean
Tan Lian Huat	–	–	–	–	Malaysian
Lim Boh Koi	–	–	–	–	Malaysian
Lee Poo Sik	–	–	–	–	Malaysian
Lee Sing Kuan	–	–	–	–	Malaysian

This clearly shows that Juan Kuang does not have a shareholder or director called Hj Mohammad bin Mahdin. This would have been sufficient to show that he was not eligible for the allocation of shares in Juan Kuang. Unfortunately the proforma itself was not tendered in evidence while various other documents in exh P3 were separately tendered and marked as exhibits. The issue that arises for consideration is whether a document in a

file which is not tendered or proved as an exhibit can be used as evidence when only the file containing the document has been tendered and marked as an exhibit. Cik Marissa Regina, one of the counsel for the first accused, in a very eloquent and able presentation submitted that the proforma is not admissible in evidence. In support of her argument she referred to several authorities. She first referred to *PP v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 where Abdoolcader J (as he then was) said at p 183:

> It is necessary to refer to certain exhibits which have been put in the course of these proceedings for identification but have not in fact been proved as they should have been and are accordingly not exhibits in the strict sense and cannot therefore form part of the record in this case, namely D41 and D43 which were both put in for identification only and which are the audited accounts and annual report of the bank for the years 1973–74 and 1972 respectively. As these two exhibits have not been proved and properly admitted as such, they must in the ultimate analysis be discounted and I shall accordingly disregard references to them and also all oral testimony as well adduced in relation thereto.

She also referred to *V Daniel v PP* [1956] MLJ 186 where it was held that a log book which was produced in evidence by the police inspector who took possession of it from the driver of a lorry was not admissible in evidence to prove the contents thereof. As I had the occasion to say in *AlliedBank (M) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1 at p 14:

> It is settled law that where a document is sought to be proved in order to establish the truth of the facts contained in it, the maker has to be called (see *R v Gillespie* [1967] 51 Cr App Rep 172; *R v Plumer* (1814) R & R 264; *Hill v Baxter* [1958] 1 QB 277; *R v Moghal* [1977] Crim LR 373). Non-compliance with this rule will result in the contents of the documents being hearsay.

In this case the proforma was merely an enclosure in exh P3 and was not even referred to nor identified by any witness. The fact that a file with enclosures has been tendered in evidence does not mean that the enclosures are proved. The file is marked as an exhibit only to show that it has been taken possession of (see *Datuk Haji Harun bin Haji Idris v PP* [1978] 1 MLJ 240). The enclosures in it must be separately proved in the normal way in order for them to have any evidentiary value. The contents of the proforma, having been not proved, are thus hearsay and inadmissible. The proforma therefore does not assist the prosecution to prove its case.

The material part of exh P3H, relied on by the learned DPP, refers only to the Police Co-operative and MITI-approved Bumiputera investors as Bumiputera shareholders in Juan Kuang. This according to the learned DPP excludes the applicant for the 500,000 Juan Kuang shares as a person who is eligible. I am unable to agree with this argument. Exhibit P3H refers only to shareholders of Juan Kuang and not its directors. A director of a company need not hold shares in the company and, as such director, is eligible for the shares. Furthermore, exh P3H also refers to MITI-approved Bumiputera investors as shareholders without giving particulars. It could include the applicant for the Juan Kuang shares in this case. In the circumstances, no evidence has been adduced by the prosecution to show

that Hj Mohammad bin Mahdin was not eligible to apply for shares in Juan Kuang with the result that there is no evidence to show that the first accused dishonestly deceived the Jawatankuasa. The transfer of RM250,000 through exh P53 into the account of Rejab bin Lebai Man from the account of Mohd Sani bin Hamid also does not implicate the first accused with the sale of the 500,000 Juan Kuang shares as the said Rejab bin Lebai Man was not identified as the first accused. Be that as it may, it is my view that the charge against the first accused is defective. As the applicant for the shares in exh P3A is Hj Mohammad bin Mahdin, he should have been identified as the applicant for the shares in the charge with evidence to show that he did not fall within the category of persons eligible to be granted special shares. As the defect in the charge goes to the root of the case for the prosecution, it is fatal. It follows that the prosecution has not made out a case against the first accused at the end of its case.

The charge against the second accused is for having abetted the first accused. Under s 107 of the Penal Code, abetment is constituted by instigating a person to commit an offence, or by engaging in a conspiracy to commit it, or by intentionally aiding a person to commit it. Abetment of an offence is a distinct offence from the offence itself (see *Sesha Ayyar v Venkatasubba Chetty* AIR 1924 Mad 487). Thus, it does not follow that if the charge against the principal offender cannot stand the case against the abettor must fall as well (see *Kee Kim Chooi & Ors v PP* [1952] MLJ 180). However, it has been held by the Indian Courts that the rule only applies in instances of abetment by instigation or by engaging in a conspiracy to commit the offence abetted (see *Faguna Kanta Nath v State of Assam* AIR 1959 SC 673; *Jammuna Singh v State of Bihar* AIR 1967 SC 553). In the Singapore case of *Chua Kian Kok v PP* [1999] 2 SLR 542 it was held that the rule that an abettor may be liable even though the principal offence was not committed should be extended to cover abetment by intentional aiding as well. The Malaysian position, however, is the same as in India. In *Periasamy s/o Sinnapan & Anor v PP* [1996] 2 MLJ 557 Gopal Sri Ram JCA in writing for the Court of Appeal said at p 584:

> The offence of abetment, when it consists of instigation, constitutes a separate and distinct offence. Consequently, an abettor who instigates the commission of an offence or conspires to commit it may be convicted of abetment, notwithstanding that one who is charged with the principal offence has been acquitted. It is otherwise where the abetment consists of intentional aiding; in such a case, acquittal of the principal offender must result in the acquittal of the abettor.

Be that as it may, the offence of abetment in the Penal Code deals only with offenders who would be classified in English law as accessories before or at the fact and not accessories after the fact (see *Varatharajalu v PP* [1960] MLJ 158). As explained in *Ratanlal & Dhirajlal's Law of Crimes* Vol I (24 Ed) at p 297:

> Abetment under the Penal Code involves active complicity on the part of the abettor at a point of time prior to the actual commission of the offence, and it is of the essence of the crime of abetment that the abettor should substantially assist the principal culprit towards the commission of the offence. Nowhere

concurrence in the criminal acts of another without such participation therein as helps to effect the criminal act or purpose is punishable under the Code. Nor does mere negligence amount to abetment.

As I have explained in an earlier part of the judgment the facts of this case can be divided into three segments. The proof of the charges against the two accused persons depends on evidence being led to establish their involvement in the first and second segments. This is because it is only the deception, as shown by the first and second segments, which constitutes the principal offence allegedly committed by the first accused and which the second accused is alleged to have abetted. With regard to the case against the second accused no evidence was adduced by the prosecution to link the second accused with the alleged deception. There is no evidence of his involvement in the first and second segments. The third segment may provide circumstantial evidence of the deception if a link is established between it and the other two segments. If there is no such link the third segment on its own may, at the highest, only amount to the offence of accessory after the fact which is not sanctioned by the Penal Code. The only evidence against the second accused is his involvement in the sale of the 500,000 Juan Kuang shares as contemplated by the third segment. That, on its own, does not show that he was involved in the allocation of shares by the Jawatankuasa. Thus, there is no evidence to link the second accused's involvement in the third segment with the first and second segments. His involvement only with the third segment does not disclose the commission of any offence. In order to make out a case against the second accused, the prosecution ought to have led evidence to show that the shares were obtained by deception with his knowledge. Without knowledge or intention, there can be no abetment and the knowledge and intention must relate to the crime (see *Mohamed Jamal v State* AIR 1930 Sind 64). It is settled law that in order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent but in some way or other it is absolutely necessary to connect him with those steps of the transaction which are criminal (see *Nim Chand Mookerjee* (1873) 20 WR 41; *Dr Dattatraya Narayan Samant v State of Maharashtra* (1982) 1 Bom CR 1). No case of abetment has, therefore, been made out against the second accused. In any event, the charge preferred against him is defective just as in the case of the first accused.

In the upshot both the accused persons ought not to have been called upon to enter their defence. Accordingly, I allowed their appeal and ordered them to be acquitted and discharged.

Appeal allowed and accused acquitted and discharged.

Reported by Chan Chin Chye